NO.....

In the Supreme Court of the United States

OCTOBER TERM, 1941

J. T. McCARTHY, JR., Doing Business as Hercules Supply Company, and G. L. MEHOLIN,
Petitioners,
VERSUS
H. C. WYNNE, and AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT

The opinion of the Circuit Court of Appeals sought to be reviewed is reported in *McCarthy* v. *Wynne*, 126 Fed. (2d) 620, and shown in the record (NR 179-184).

The opinion of the same Court on first appeal of the case is reported in *Wynne* v. *McCarthy*, ~~99~~ 97 Fed. (2d) 964.

II.

JURISDICTION

A full statement of the grounds on which the jurisdiction of this Court is invoked has been made in the petition under headings II and IV, and in the interest of brevity such statement is not repeated here.

III.
STATEMENT OF THE CASE

A concise statement of the case containing all that is material to consideration of the questions presented, with appropriate page references to the printed record, has been made in the petition under heading I, which statement is hereby adopted and made a part of this brief.

IV.
ASSIGNMENTS OF ERRORS

1. The court erred in its decision holding that under its former opinion and mandate the trial court properly limited McCarthy's defenses and the second trial to the single issues of the value of the property at the time of the alleged conversion.

2. The court erred in its decision holding that McCarthy was not entitled to a trial by jury on such second trial.

V.
ARGUMENT

Synopsis of Argument

In support of the errors assigned, petitioners assert and rely upon the following propositions, which will be presented and considered in order.

Proposition I.

Petitioner McCarthy was entitlled to a new trial *in toto.*

Point A. The action was one at law.

Point B. Being an action at law, it could only be proceeded with as law action, regardless of prior status in in equity.

Point C. Wynne's remedy having been determined to be that of action at law, McCarthy was entitled to the rights guaranteed to him in a law action, namely, a new trial of all issues, including a trial by jury.

Point D. This case not within the exception permitting limitation of new trial in law actions to single issue of damages.

Point E. Effect of mandate on first appeal was not to direct that the further proceedings be limited to the single issue of damages.

Point F. The Circuit Court of Appeals could not have remanded the case with leave to Wynne to amend his pleadings without granting to McCarthy the right to interpose his defenses.

Proposition II.

Not only was McCarthy entitled to a new trial, he was entitled to a trial by jury.

Proposition 1.

Petitioner McCarthy was entitled to a new trial *in toto*.

Point A: The action was one at law.

On first appeal Wynne's remedy was determined to be an action for conversion or on implied contract arising out of conversion. Pursuant thereto, he amended his petition (NR 15-16), alleging conversion of the property on Febru-

ary 10, 1925, and seeking only a money judgment for its value. The action was one at law. His remedy at law was plain, speedy, and adequate.

Declaratory of the law with respect to cases of equity jurisdiction as distinguished from actions at law, as pointed out in the cases hereinafter cited, Section 267 of the Judicial Code (Sec. 384, Title 28, U. S. C. A.) states the rule to be:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This Court in the case of *United States* v. *Bitter Root Development Company*, 200 U. S. 451, 26 S. Ct. 318, 50 L. ed. 550, has definitely established that an action for conversion or on an implied contract arising out of conversion, such as here involved, is one at law.

Other cases particularly applicable are:

Buzard v. *Houston*, 119 U. S. 347, 7 S. Ct. 249, 30 L. ed. 451.

Parkerson v. *Borst* (5th Cir.), 251 Fed. 242.

Cecil Natl. Bank v. *Thurber* (4th Cir.), 59 Fed. 913.

South Penn Oil Co. v. *Miller* (4th Cir.), 175 Fed. 729.

Whitehead v. *Shattuck*, 138 U. S. 146, 11 S. Ct. 276, 34 L. ed. 873.

Investors Guaranty Corp. v. *Luikart* (8th Cir.), 5 Fed. (2d) 793.

Curriden v. *Middleton*, 232 U. S. 633, 34 S. Ct. 458, 58 L. ed. 765.

Wood v. *Phillips* (4th Cir.), 50 Fed. (2d) 714.

If the Circuit Court of Appeals in its opinion (NR 179-184 at 183; 126 Fed. (2d) 620 at 623) intended to say that because an "action on assumpsit or implied contract for goods had and received is a remedy which is equitable in origin and character," the instant action is a suit in equity and should be proceeded with as such, rather than as an action at law, it is greatly in error and thus announces a doctrine contrary to the authorities above cited, including decisions by this Court. The authorities thus cited, including cases referring specifically to actions in assumpsit, are replete with statements that although a cause of action involves equitable features and includes allegations of elements falling under the head of chancery jurisdiction, nevertheless if the remedy by pecuniary judgment is complete the action must be regarded as one at law because of the defendant's constitutional right of a trial by jury in such cases.

The case of *Stone* v. *White*, 301 U. S. 532, 57 S. Ct. 851, 81 L. ed. 1265, cited by the Court below in support of the statement that the remedy of assumpsit or for money had and received is equitable in its origin and nature, is careful to make it clear that although equitable in origin and having equitable features, such remedy constitutes "an action at law."

Neither can it be assumed that the petition in this case as amended following the first appeal is in the nature of an action of assumpsit based on implied contract, rather than *in tort* for conversion. It simply alleges (NR 15-16) that McCarthy was guilty of conversion and by reason of the conversion became liable and bound to pay the plaintiff

the reasonable value of the property at the time of the conversion, and prays judgment by reason thereof. Whether the action be for tort or on implied contract, it is nevertheless an action at law, hence we do not attempt to more definitely classify it as being a tort action rather than in assumpsit.

Point B: Being an action at law, it could only be proceeded with as a law action, regardless of prior status in equity.

Regardless of the nature of the action prior to first appeal, whether a suit in equity or an action at law, when on appeal it was determined that Wynne could not prevail on the theory of the first judgment, namely, that of a recovery in accounting based on the express contract, but that his remedy was at law for conversion or on implied contract arising out of conversion, and the judgment was vacated and Wynne given leave to amend his petition, which he did, the action could only be proceeded with as an action at law in accordance with the rights guaranteed to the parties in actions at law.

If a law action in the first instance, it of course would continue as a law action.

If an equity action in the first instance, equity lost jurisdiction and further proceedings and all rights of the parties would be those applicable to actions at law. See:

Toucey v. *New York Life Ins. Co.* (8th Cir.), 102 Fed. (2d) 16.

American Falls Milling Co. v. *Standard Brokerage & Distributing Co.* (8th Cir.), 248 Fed. 487.

Mitchell v. *Dowell*, 105 U. S. 430, 26 L. ed. 1142.

Diamond Alkali Co. v. *Tomson* (3rd Cir.), 35 Fed. (2d) 117.

Wood v. *Phillips* (4th Cir.), 50 Fed. (2d) 714.

Glauber v. *Agee Dept. Stores* (D. C. W. D., Ky.), 1 Fed. Rules Dec. 137.

Lewis Publ. Co. v. *Wyman* (Mo., D. C.), 168 Fed. 756.

Brauer v. *Laughlin*, 235 Ill. 265, 85 N. E. 283.

Wasatch Oil Ref. Co. v. *Wade*, 92 Utah 50, 63 Pac. (2d) 1070.

Reynolds v. *Warner*, 125 Neb. 304, 258 N. W. 462.

Booneville Natl. Bank v. *Blakey*, 166 Ind. 427, 76 N. E. 529.

The reason for the rule, as pointed out in the authorities cited, is the right of the defendant to a particular kind of a trial in a law action, including a trial by jury guaranteed by the Seventh Amendment to the United States Constitution—a right which cannot be denied to the defendant merely because a plaintiff attempts in the first instance to maintain his action as a suit in equity.

So strict was the rule guaranteeing to the defendant his rights in an action at law under the Constitution that prior to the adoption of Federal Equity Rule No. 22 a plaintiff, misconceiving his remedy and filing his action in the nature of a suit in equity, could not proceed further in the same action after it was determined that his remedy was in fact at law. It was necessary that he dismiss and refile the action as an action at law.

With the adoption of Federal Equity Rule 22 it was no longer necessary that the suit be refiled but that "if at any time it should appear that a suit commenced in equity should have been brought as an action on the law side of the court," as in this case, "it shall be forthwith transferred to the law side and be there proceeded with * * *"

With the adoption of the new Federal Rules of Civil Procedure abolishing the two divisions of the Court, which became effective at the time this case was remanded, a motion to transfer the case from the equity side of the docket to the law side was no longer appropriate, but nevertheless the Court was called upon, without such a motion, to recognize the remedial rights of the defendant growing out of the fact that the suit was in fact a law action as distinguished from its previous purported equitable status. It is the established rule that although the procedural distinctions between actions at law and in equity have been abolished, the distinction between legal and equitable remedies still exists.

Williams v. *Collier*, 32 Fed. Sup. 321, D. C. E. D. Pa.

Grauman v. *City Company of New York*, 31 Fed. Sup. 172.

Bellevance v. *Plastic-Craft Novelty Co.*, 30 Fed. Sup. 37.

Fitzpatrick v. *Sun Life Assurance Co.*, 1 Fed. Rules Dec. 713.

Moore's Federal Practice, Vol. 1, p. 196.

The demand by the defendant McCarthy for a jury

trial (NR 23), a right existent only in an action at law, performed the same function as would a motion to transfer the case from the equity to the law side of the docket, in that it definitely called the Court's attention to the demand of the defendant that the case be treated as a law action. The demand for a jury trial was filed at the earliest opportunity, following the determination by the Circuit Court of Appeals on first appeal that Wynne was not entitled to the relief originally sought and granted, and following the change in the form of the action evidenced by the amendment to the petition to state a cause of action in conversion.

Point C: Wynne's remedy having been determined to be that of an action at law, McCarthy was entitled to the rights guaranteed to him in law actions namely, a new trial of all issues, including a trial by jury.

When on appeal the judgment following the first trial was vacated, there was no longer a judgment against McCarthy. It being determined that Wynne's remedy was an action at law for conversion or upon implied contract arising out of conversion, another judgment could only be entered against McCarthy in accordance with the practices and guarantees applicable to law actions, namely, the right to a new trial by a jury of all facts and issues necessarily determinable under the pleadings to support such judgment.

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879.

Indemnity Insurance Co. v. *Levering* (9th Cir.), 59 Fed. (2d) 719.

Gasoline Products Co. v. *Champlin Refg. Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188.

Shell Petroleum Corp. v. *Shore* (10th Cir.), 80 Fed. (2d) 785.

Illinois Power & Light Corp. v. *Hurley* (8th Cir.), 49 Fed. (2d) 681.

Hodges v. *Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169.

McKeon v. *Central Stamping Co.* (3rd Cir.), 264 Fed. 385.

Great American Ins. Co. v. *Johnson* (4th Cir.), 27 Fed. (2d) 71.

Millers Mutual Fire Ins. Assn. v. *Bell* (8th Cir.), 99 Fed. (2d) 289.

The action of the trial court in this case, denying to McCarthy a new trial of all issues and overruling the demand for a jury trial, sanctioned in its opinion by the Circuit Court of Appeals, was to deny McCarthy the guaranty of the Seventh Amendment to the Constitution of the United States and is in conflict with the foregoing decisions of this Court and of other Circuit Courts of Appeals.

Point D: This case not within the exception permitting limitation of new trial in law actions to single issue of damages.

The court below in its opinion (NR 179-184 at 183, 126 Fed. (2d) 620 at 623) attempts to justify the limiting of the second trial to the single issue of damages on two grounds.

First. The Court says the action was justified because in equity it is a proper practice to limit further hearings to a specific issue or issues citing equity cases.

It has already been pointed out herein that when it was determined on appeal Wynne was not entitled to relief in equity based on the written contract, which he first sought, and that his remedy was in fact an action at law for conversion or on implied contract arising out of conversion, the action could only be proceeded with as one at law and not one in equity. Furthermore, as will be pointed out under Point E, the Court did not in its first opinion or mandate direct that the further proceedings be limited to any specific issue or issues. It vacated the judgment in its entirety, granted leave to Wynne to amend his petition without limitation, and in general terms directed that he be permitted to proceed in accordance with the opinion (NR 13).

Second. The Court says in its opinion that, if the action be regarded as one at law, the action of the lower court was justified by the exception to the general rule which in certain instances permits in law actions the limitation of a second trial to the issue of damages, citing the cases of:

Gasoline Products Co. v. *Champlin Refg. Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188.

May Dept. Stores Co. v. *Bell* (8th Cir.), 61 Fed. (2d) 830.

Mutual Life Ins. Co. of New York v. *Sayer* (3rd Cir.), 81 Fed. (2d) 752.

Empire Fuel Co. v. *Lyons* (6th Cir.), 257 Fed. 890.

Other cases recognizing this same exception are:

Massachusetts Bonding & Ins. Co. v. *John R. Thompson Co.* (8th Cir.), 88 Fed. (2d) 825.

Norfolk S. R. Co. v. *Ferebee*, 238 U. S. 269, 35 S. Ct. 781, 59 L. ed. 1303.

City of Orlando v. *Murphy* (5th Cir.), 84 Fed. (2d) 531.

United States v. *Meyer* (3rd Cir.), 76 Fed. (2d) 354.

Cub Fork Coal Co. v. *Fairmount Glass Works* (7th Cir.), 59 Fed. (2d) 539.

The cases cited are illustrative of the exception and its application.

As will be disclosed from a reading of the decisions in the cases cited, such practice is to be exercised sparingly and may not properly be resorted to unless it clearly appears that no injustice can result therefrom. This Court in the case of *Gasoline Products Co.* v. *Champlin Refg. Co.*, *supra*, on certiorari denied the application of the exception to the circumstances there existing. The application of the exception to the instant case would amount to an unreasonable extension of its intended use and would conflict with the principles announced in the foregoing cases.

In each case in which the exception has been allowed and a retrial limited to the single issue of damages, the issue of liability had on the first trial been properly tried and determined, and not disturbed on appeal; the verdict or judgment was challenged on appeal because of the amount of the damages; the verdict or judgment, in most if not in every instance, was vacated and set aside only as to the

element of damage, affirmed as to liability, and the case remanded with specific instructions that only the one issue be tried. Illustrative of the facts and circumstances just enumerated is the order of the court in the case of *Massachusetts Bonding & Insurance Co.* v. *John R. Thompson Co., supra,* in which the mandate of the Court was as follows:

> "The judgment in so far as it constitutes a determination that the surety is liable to the plaintiff upon the bond in suit is affirmed. In so far as the judgment constitutes a determination of the amount for which the surety is liable, it is reversed. The case is remanded, with directions to set aside the findings in so far as they relate to the amount of the surety's liability, and to grant the surety a new trial as to that issue" (88 Fed. (2d) at page 832).

In none of the cases to which our attention has been called was there a change in the pleadings or of any of the issues between the time of the first trial and the second trial. The pleadings and the basis of liability in each case remained the same.

In the instant case the findings of fact (OR 57-66), conclusions of law (OR 66-68), and the judgment (opinion OR 107-108; decree OR 111-113) on first trial were all based on a liability growing out of the enforcement of the express written contract. It was found that the contract (Conclusion of Law IV, OR 66) was "one of sale," passing title to McCarthy, and that the liability of McCarthy was for the "sale price" of the merchandise under the contract, a theory and basis of liability wholly antagonistic to any thought or contention that McCarthy could have converted

the property. A contention that McCarthy was the purchaser and thus the owner of the property and that he was also liable for conversion could not have existed in the same suit.

Merriman v. *Chicago & E. I. R. Co.* (7th Cir.), 64 Fed. 535 at 550.

Shields v. *Barrow*, 17 How. 130, 15 L. ed. 158.

On first appeal McCarthy took issue not only with the amount of the judgment but with the determination of liability. The Circuit Court not only vacated the judgment as to the measure of damages, but also held that because the contract was never consummated relief could not be had based thereon, and thus denied and upset the very theory of liability adopted by the master and the trial court. The judgment was not affirmed in part and vacated in part, as in the cases cited. It was vacated in its entirety. Hence, the issue of liability was not properly tried or determined by the trier of facts on first trial.

The theory and basis of liability upon which the damages were determined on second trial, namely, that of conversion, was not the basis of liability adopted on the first trial. The pleadings had been amended to allege for the first time a conversion on February 10th, 1925. There has never been a judgment by any "trial court" or "jury" in this case based on liability because of conversion, except the judgment following the second trial at which the issue of conversion was not tried.

In the case of *Gasoline Products Co.* v. *Champlin Refg. Co. supra*, this Court said (283 U. S. at page 500) that where the question of damages "is so interwoven with that

of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty" a new trial of all the issues should be had.

In that case the question of the date of the breach of the contract was material to a determination of the damages, and since such date had not been previously determined, this Court in its application of the rule last above stated refused to condone the submission to a jury of the question of damages without submitting the issue of liability because of the breach of the contract.

In the instant case the determination of the damages for conversion was definitely and indistinguishably interwoven with the issue of the date on which the conversion is claimed to have occurred. The Circuit Court of Appeals in its first opinion (97 Fed. (2d) at p. 970) correctly stated the measure of damages for conversion to be the value of the merchandise at the "*time*" of the conversion, coupled with the interest from such "time." Thus, until the date of the conversion was determined the damages could not be determined. Just as in the case of *Gasoline Products Co.* v. *Champlin Refining Co., supra*, the date of the breach of the contract was so interwoven with the issue of damages as to preclude limitation of the retrial to the single issue of damages, so here the previous undetermined issue as to the date of the alleged conversion would preclude any limitation of the retrial to the single issue of damages. In this case there had been no determination of the date of conversion. Neither the Special Master nor the trial court on the first trial, deciding the case and entering judgment

based on the written contract, purported to make any finding in regard thereto. The finding of fact of the Master (No. XIII, OR 64-65), upon which the Circuit Court of Appeals on first appeal relied to support its observation that Wynne's remedy was for conversion, merely recited that at the time of the trial it was impossible from the evidence to find "the amount of materials that was actually sold by the defendant J. T. McCarthy, Jr., by any system of accounting, by reason of the fact that supplies of a similar nature were on hand for sale in the defendant's stores and the materials and supplies shipped under the contract mixed and intermingled with materials and supplies in the defendant's stock of goods, and the goods moved from place to place *during the time that the defendant J. T. McCarthy, Jr., had possession of said materials and supplies.*" It should be borne in mind that in making this finding the Master, taking the position that under the contract title was in McCarthy, was not purporting to make a finding of conversion, nor was he concerned with the date of a possible conversion, but was simply explaining why in applying the contract formula for arriving at the sale price, no accounting could be had of the goods "actually sold by the defendant." There was no determination of the date of the conversion by the Circuit Court of Appeals on appeal. Its mandate and the leave granted Wynne to amend his petition was left open in this respect. Wynne by his amendment to the petition could have alleged that the conversion occurred on December 9, 1930, the date when according to his petition prior to first appeal McCarthy first refused to deliver up possession of the goods (par. 10, OR 29 or NR

230-231), the date in February, 1925, when the goods were first delivered to McCarthy, or any other date "during the time J. T. McCarthy, Jr., had possession of said materials and supplies." Wynne being left free to select a date as being the date of the conversion, McCarthy should have been unrestricted in his right to take issue with such date. This issue could not be determined separate and apart from the issue of conversion itself, and hence McCarthy was entitled to a new trial of all issues.

Point E: Effect of mandate on first appeal was not to direct that the further proceedings be limited to the single issue of damages.

Assuming, but not admitting, that the Court on first appeal had the right to remand the case for a new trial upon the specific issue of damages, such was not the effect of its mandate. The mandates in the various cases cited under Point D expressly and specifically directed that only a partial new trial was to be had and designated the specific issue to be so retried, affirming the judgment otherwise.

If anything short of a new trial of all the issues was intended, the limitation should appear from the mandate.

In the case of *Indemnity Insurance Co. of North America* v. *Levering* (9th Cir.), 59 Fed. (2d) 719, trial was had without a jury, followed by an appeal to the Ninth Circuit Court of Appeals. On appeal the Court entered an order substantially identical with that in the instant case, namely, reversing the judgment and directing the lower

court to proceed in conformity with the decision of the Court. The lower court proceeded to enter a judgment without granting a new trial. The Appellate Court on second appeal said that although it may be possible that on previous appeal it might have limited the new trial to the specific issue raised on such appeal, citing *Gasoline Products Co.* v. *Champlin Refining Co., supra,* but went on further to say that since the mandate did not so direct, the trial court could not give to it that interpretation. The Court said (59 Fed. (2d), at p. 720):

> "This was not done, however. The effect of our order of reversal and mandate thereon was to call for a new trial upon all the issues. The trial was denied by the court and for that reason the judgment must be reversed."

In the case of *Millers Mutual Ins. Assn. of Illinois* v. *Bell* (8th Cir.), 99 Fed. (2d) 289, the Court, construing an almost identical order and mandate, said:

> "The effect of our mandate was to direct the lower court to grant a new trial, but in retrying the case not to make the same error for which the judgment was reversed."

The same opinion contains the following interesting statement with respect to the amendment of pleadings after the reversal of the first judgment:

> "The rule as to amendments to pleadings (See *McAllister* v. *Sloan,* 8 C. I. R., 81 Fed. (2d) 707, 708, 709), upon the retrial of an action at law after a reversal is, we think, the same which applies to amendments to the pleadings upon the first trial of the action. The situation is as though the case had never been tried."

The general rule, as stated in 5 C. J. S., at page 1476, is as follows:

> "The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been entered."

Point F: The Circuit Court of Appeals could not have remanded the case with leave to Wynne to amend his pleadings without granting to McCarthy the right to interpose his defenses.

This proposition needs no argument other than to quote from the case of *Warner* v. *Godfrey*, 186 U. S. 365, 22 S. Ct. 852, 46 L. ed. 1203, wherein it is said:

> "A case cannot be remanded by an appellate court for the purpose of allowing the complainant to amend the bill in order to assert a new and distinct ground of relief, if the defendants are deprived by such mandate of all opportunity to interpose a defense."

Proposition 2.

Not only was McCarthy entitled to a new trial, he was entitled to a trial by jury.

The right to a new trial would ordinarily under the Seventh Amendment to the Constitution of the United States carry with it the right to trial by a jury. See authorities cited under Point C, Proposition 1, of this brief.

Even if the new trial was to be limited to the single issue of damages, the right of trial by jury would extend in any event to such single issue to be retried. See authorities cited under Point D, Proposition 1, of this brief.

The Circuit Court of Appeals in its opinion in this case sanctions the denial by the trial court of McCarthy's demand for a trial by jury on the theory that because the stipulation waiving a jury on the first trial contained other mutual stipulations constituting a consideration therefor, it was binding on the parties throughout the entire litigation, citing *Park* v. *Mighell*, 7 Wash. 304, 35 Pac. 63, and *Raleigh Bank & Trust Co.* v. *Safety Transit Lines*, 200 N. C. 415, 157 S. E. 62. In this, the decision by the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals and with the overwhelming weight of authority. See:

Burnham v. *North Chicago Street R. R. Co.* (7th Cir.), 88 Fed. 627;

F. M. Davies & Co. v. *Porter* (8th Cir.), 248 Fed. 397;

North Pacific R. R. Co. v. *VanDusen* (D. C. Minn.), 34 Fed. (2d) 786;

4 Cyc. of Fed. Proc., p. 874;

Sharrock v. *Kreiger*, 6 I. T. 466, 98 S. W. 161;

Osgood v. *Skinner*, 186 Ill. 491, 57 N. E. 1041;

McGeath v. *Nordberg*, 53 Minn. 235, 55 N. W. 117;

Worthingham v. *Nashville Ry. Co.*, 114 Tenn. 177, 86 S. W. 307;

Cross v. *State*, 78 Ala. 430;

State v. *Fouchet*, 33 La. Ann. 1154;

Dean v. *Sweeny*, 51 Tex. 242;

Brown v. *Chenoworth*, 51 Tex. 469;

Town of Carthage v. *Buckner,* 8 Ill. App. 152;

Schumacher v. *Crane,* 66 Neb. 440, 92 N. W. 609;

Farmers Handy Wagon Co. v. *Casualty Co. of America,* 184 Iowa 773, 167 N. W. 204;

Benbow v. *Robbins,* 72 N. C. 422;

Guyer's Estate v. *Caldwell,* 98 Ill. App. 232;

Cochran v. *Stewart,* 66 Minn. 152, 68 N. W. 972;

White v. *A. C. Houston Lbr. Co.,* 179 Okla. 89, 64 Pac. (2d) 908;

Nashville v. *Foster,* 10 Lea. 351.

We call particular attention to the case of *Burnham* v. *North Chicago Street R. R. Co., supra,* from the Seventh Circuit Court of Appeals, being what appears to be the leading case on the subject. In that case the stipulation waiving a trial by jury was not an ordinary waiver but was a written stipulation signed by both parties, involving mutual stipulations and agreements other than the waiver of the jury trial. The Court in that case said:

"The stipulation to waive a jury, and to try the case before the court, only had relation to the first trial. There could be no presumption then that there would ever be a second trial; and therefore it should not be presumed that the parties, in making the stipulation, had in mind any possible subsequent trial after the first, to which the stipulation could refer. The right of a trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guaranteed by the United States Constitution. A stipulation for the waiver of such right should therefore be

strictly construed in favor of the preservation of the right."

The stipulation waiving a jury involved in the case of *F. M. Davies & Co.* v. *Porter, supra,* was likewise in writing, signed by both parties, and would thus constitute a contract between the parties. The Eighth Circuit Court of Appeals said:

> "It is claimed that, as the first trial was had to the court, a jury having been waived by stipulation in writing, it was error to grant plaintiff's motion to try the cause to a jury. The contention is without merit, as such a stipulation does not affect the right of either party to demand a trial by jury, on a second trial, after the judgment in the first trial has been reversed and remanded for a new trial."

In this case it is clear that the parties entered into the stipulation on the theory that the action was one brought upon the contract upon which both parties were relying. It was further entered into upon the assumption that the suit was properly on the equity docket. The stipulation was made in the light of the pleadings as then drawn.

Several of the cases above cited discuss the matter of an agreement to waive a jury in relation to a subsequent amendment of the pleadings. They all limit the effect of such a contract to a trial of the issues as raised by the pleadings then drawn.

Neither the case of *Park* v. *Mighell, supra,* nor *Raleigh Bank & Trust Co.* v. *Safety Transit Lines, supra,* cited by the Circuit Court of Appeals in the instant case to support its conclusion, involved in any way situations in which the

pleadings or issues were altered or amended. The case of *Park* v. *Mighell* did not involve a second trial at which evidence was to be taken but merely a re-reference of the case to the trial court to correct its findings based on the record as already made. The *Raleigh Bank & Trust Co.* case did involve a second hearing at which evidence was to be introduced, although it was made clear in the opinion that the issues on the second trial were identical with the issues on first trial, and that such second trial was in effect simply a continuation of the first trial.

All the cases would seem to emphasize the proposition that where there is any possible doubt, the doubt should be resolved in favor of granting a trial by jury.

This Court in the case of *Demick* v. *Schiedt,* 293 U. S. 474, 53 S. Ct. 296, 79 L. ed. 603, used this language:

> "Any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari to the United

States Circuit Court of Appeals for the Tenth Circuit and thereafter reviewing and reversing said decision.

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June, 1942.

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